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In the Supreme Court of the United States
October Term, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF AFFIRMANCE

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BRIEF AMICUS CURIAE OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF AFFIRMANCE

The Lawyers Committee for Human Rights respectfully submits this brief *amicus curiae* in support of the October 18, 1991 judgment of the United States Court of Appeals for the Ninth Circuit by Judges Alfred Goodwin, Mary Schroeder, and Samuel King. This judgment affirmed the decision of the United States District Court for the Central District of California, by Judge Edward Rafeedie, that the District Court lacked personal jurisdiction to try a citizen of Mexico who was abducted at the direction of United States drug agents from the national territory of Mexico across the international border, in violation of the 1980 Extradition Treaty between the United States and Mexico. By letters lodged with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

Statement of Interest of Amicus Curiae.

The Lawyers Committee for Human Rights is a non-profit organization founded in 1978 to protect fundamental liberties. The Honorable Marvin Frankel, former United States District Judge for the Southern District of New York and now senior partner in Kramer, Levin, Nessen, Kamin & Frankel, is Chairman of the Lawyers Committee. The Executive Director is Michael Posner, Esq., a member of the bar of California and the bar of Illinois. The Lawyers Committee regularly sends fact-finding missions to foreign countries, consults with the Congress and Executive agencies on federal policy and legislation, and from time to time, files its views in pending litigation where it may be of assistance to the Court. University research facilities and the public records of the National Archives of the United States, available to the Lawyers Committee, have afforded legal materials that may be useful to the Court in a just determination of this appeal.

Summary of Argument

All citizens of national states share a common interest in the fundamental human liberty to be free from abduction, disappearance and arbitrary arrest. The 1980 United States-Mexico Extradition Treaty promotes enforcement of criminal law, while protecting the sovereignty of each nation over its own territory, and safeguarding the civil liberties of individuals in inter-nation surrenders. The forcible abduction of Alvarez-Machain and his continued detention for trial violate the 1980 Extradition Treaty, as well as the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

By established standards of international law and precedents of this Court, personal jurisdiction over a defendant is barred where he has been brought within the territory in violation of an international convention, unless the violation has been waived by consent.

Argument

I. The kidnapping and abduction of a defendant across the international border is prohibited by the 1980 United States-Mexico Extradition Treaty.

A. The President of the United States did not authorize the abduction of Alvarez-Machain, and has not terminated, suspended, or denounced the 1980 Extradition Treaty.

The present extradition treaty between the United States and Mexico was signed in Mexico City on May 4, 1978.[1] Ratification was advised and consented to by the United States Senate on November 30, 1979. Ratifications were exchanged at Washington, D.C. on January 25, 1980, and on that date, the treaty entered into force. On February 6, 1980, the President of the United States issued a proclamation that the treaty

> "be observed and fulfilled with good faith on and after January 25, 1980, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof."[2]

The treaty with Mexico has remained in force since that date.[3] At any time since 1980, the United States could have chosen to exercise its right under Article 23(4) of the treaty, which allows either party to "terminate this Treaty by giving notice to the other Party." Termination would have taken effect six months later. Instead, the United States has remained as Contracting Party to the treaty. The treaty undertakings by the United States are promises willingly assumed and maintained.

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1. Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as U.N.T.S. 19462 on Dec. 9, 1980, pursuant to Article 102 of the Charter of the United Nations, *reprinted in* J.A. 72-87.

2. *Id.*

3. *See, e.g., Department of State, Treaties in Force* 160 (1990).

Even after the loathesome events of 1985, when an American law enforcement agent Enrique Camarena-Salazar was murdered on Mexican soil, the United States chose not to exercise its treaty right to give six months notice and terminate the 1980 treaty. The United States has made plain its judgment that it is advantageous to continue legal cooperation with Mexico in fighting drug conspiracies.[4] Mexico has prosecuted and convicted numerous members of the drug conspiracy that killed Agent Camarena, with prison sentences of forty years in two cases and terms exceeding twelve years in other cases.[5]

This is not a situation where a President has taken action to terminate, suspend, or denounce a treaty. The Solicitor General has not suggested that President Bush authorized or requested the abduction of Humberto Alvarez-Machain from the territory of Mexico. The record in the case indicates that the kidnapping operation in April 1990 was authorized and undertaken by career agents of the Drug Enforcement

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4. *See, e.g.*, Remarks of Attorney General Richard Thornburgh at Joint News Conference with Mexican Attorney General Alvarez del Castillo, Mexican Secretary Solana, U.S. Secretary of State James Baker, and others (Aug. 7, 1989), *reprinted in* 29 International Legal Materials (I.L.M.) 21-22 (1990), *also in* 89 U.S. Dept. of State Bull. 78 (No. 2151) (Oct. 1989):

> With regard to extradition matters, there is in effect an extradition agreement between the Governments of the United States and of Mexico, and it has been utilized to the advantage of both parties in the past from time to time. *The extradition of money launderers, like that of an offender within either country, is subject to that treaty and remains so following our discussion today.*
>
> One of the important agreements reached between the Attorney General of Mexico and myself today was to form a study group, a working group of prosecutors within our respective departments, well versed in the technicalities of extradition to ensure that this treaty and this process are utilized to the mutual advantage of both our countries. Therefore, *beyond the reaffirming of the existence of the treaty* and the commitment to form this working group, *there was no need for any additional action to bring money launderers or any other offenders in either country within the reach of the current law.*

5. *See* Brief for United Mexican States as *Amicus Curiae*, at p. 26, n.24. Rafael Caro-Quintero has been imprisoned in Mexico on a forty-year sentence; he is a named co-conspirator of Alvarez-Machain in the instant case.

Administration.

Thus, the case does not involve any measure of the scope of the President's own authority to authorize extraterritorial operations.

The abduction of Alvarez-Machain by DEA-sponsored operatives, before any extradition request with the required evidentiary support could be presented to Mexico,[6] may well be explicable in human terms; any law enforcement agent is properly impatient when one of his colleagues has been victimized. But the decision of the agents to take the law into their own hands did not change the rules designed to protect the civil liberties of United States and Mexican citizens alike.

B. Transborder abductions violate the 1980 Extradition Treaty.

The 1980 Extradition Treaty between the United States and Mexico does *not* leave both countries free to abduct citizens from the territory of the other. The construction offered by the Department of Justice in this unprecedented case, defending the DEA abduction, would allow Mexico to kidnap an American businessman from New York City for trial on a political offense, without any violation of the Extradition Treaty. By the Department's proffered view, a Mexican police agent could spirit an American college student from Los Angeles, California, to a jail in Guadalajara on a charge for which there is no evidence, without any violation of the Extradition Treaty. This free-for-all would make a nullity of the treaty promises, and is blind to the careful procedures that

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6. Even at the present date, the United States has not presented to Mexico the evidentiary basis for an extradition request for Alvarez-Machain. Attorney General Richard Thornburgh has noted the success of the Department of Justice in obtaining custody of defendants through extradition. "Our extradition record is one of which we are justly proud. . . . Only one percent of the foreign fugitive cases handled by the Criminal Division were closed because extradition was finally and unequivocally denied by foreign jurisdictions . . . . / Only about 6% of the drug trafficking cases end with a final denial of extradition." Statement of Attorney General Thornburgh to the Senate Drug Caucus, *reprinted in* 135 Cong. Rec. S16615 (Nov. 21, 1989, legislative day of Nov. 6, 1989).

protect Americans as much as Mexican citizens from unreviewed deliveries across the border.

Extradition treaties serve the several purposes of promoting the enforcement of criminal law, protecting the sovereignty of each signatory nation over its own territory, and safeguarding the civil liberties of citizens and other individuals who are sent abroad for trial. In the American view during the last two centuries, the surrender of fugitives has been an obligation that exists solely by virtue of treaty. The history of America explains this axiom: many of our ancestors were in flight from foreign oppression, and any unstructured obligation to return persons accused of crime to a foreign government, without imposing careful treaty protections, would have endangered emigrants from tyrannical lands.[7]

To protect our own national citizens, yet provide cooperation in enforcing criminal law, the United States has negotiated treaty undertakings for the return of fugitive criminals with countries whose system of criminal justice meets our basic standards of fairness. Extradition treaties with Mexico have been in force since the middle nineteenth century,[8] long

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7. *See Francis Wharton, A Treatise on the Conflict of Laws or Private International Law* 598 (Philadelphia 1872) ("Cherishing as we have always done the right of free asylum for political and religious refugees, both as one of the happiest agents of our own colonizations and as one of the proudest prerogatives of our institutions, it was natural that our statesmen and jurists should at an early period have declared that there was no duty either moral or juridical which made it incumbent on our government, unless under the sanction of a prior treaty, to surrender to foreign sovereigns fugitives who, even when under criminal prosecution, find refuge on our shores.").

8. The earlier United States-Mexico extradition treaties are the 1862 treaty, the 1899 treaty, and the Supplementary Conventions of 1903, 1926, and 1941. *See* Treaty Between the United States of America and the United Mexican States for the Extradition of Criminals (entered into force May 20, 1862; terminated January 24, 1899), 12 Stat. 1199, T.S. No. 209; Treaty of Extradition, United States of America-United States of Mexico (entered into force April 22, 1899; terminated Jan. 25, 1980), 31 Stat. 1818, T.S. No. 242; Supplementary Convention (entered into force April 13, 1903), T.S. No. 421 (adding bribery to list of extraditable offenses); Supplementary Convention (entered into force July 11, 1926), 44 Stat. 2409, T.S. No. 741 (adding narcotics offenses, hazardous substances, and

before the multilateral treaties of this century, such as the United Nations Charter or Charter of the Organization of American States.

The 1980 Extradition Treaty between the United States and Mexico contains numerous substantive and procedural safeguards, designed to protect citizens of both countries. There would be no point to any of these protections if a foreign government could evade them by sending armed men to abduct suspects. Under the Mexico-United States treaty, an extradition can take place only for federal crimes punishable by a year or more in prison and for an agreed list of state crimes. See Article 2. Adequate evidence must be submitted, enough to bind a person over for trial *"according to the laws of the requested Party."* See Article 3. Any request for extradition shall be processed "in accordance with the legislation" of the requested party, see Article 13, and by incorporating Mexican law, this treaty provision guarantees a hearing for the defendant before he can be sent abroad for trial.[9]

The treaty prohibits extradition when the offense "is

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smuggling); Supplementary Extradition Convention Between the United States of America and the United Mexican States (entered into force April 14, 1941), 55 Stat. 1133, T.S. No. 967 (adding the crime of "being an accessory before or after the fact") (supplementary conventions terminated Jan. 25, 1980). The early history of negotiations between the United States and Mexico is discussed in *John Bassett Moore, A Treatise on Extradition and Interstate Rendition* 97 (1891).

The 1980 Extradition Treaty, *supra* note 1, has now been supplemented by the extradition provisions of the 1988 Vienna Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances. *See* p. 19 *infra*.

9. Ley De Extradición Internacional, arts. 24-27, El Diario Oficial de la Federación (December 29, 1975), *also reprinted in Códigos de Procedimientos Penales* (39th ed. 1988). The full text of the Mexican extradition law is provided and translated in Tabs *G* and *H* of the Appendix to the Brief *Amicus Curiae* of the Lawyers Committee for Human Rights, United States v. Alvarez-Machain, No. 90-50459 (9th Cir.). *See also* Statement of Gisela Von-Muhlenbrock, Legal Specialist, Hispanic Law Division, Library of Congress, *Hearings on the Extradition Reform Act of 1981, Before the Subcommittee on Crime, House Committee on the Judiciary*, 97th Cong., 2d Sess., at 431, 463-64 (1982) (discussing extradition law in Mexico). In the comparable safeguard of American law, 18 U.S.C. § 3184, a federal or state judge or magistrate must certify that treaty requirements have been met before extradition to consign a person to a foreign trial can proceed.

political or of a political character," see Article 5(1), recognizes a double jeopardy rule, see Article 6, and allows each party to refuse extradition where the death penalty could be imposed on the defendant in the requesting country and the applicable laws of the requested country would not provide for such punishment, see Article 8.

The treaty makes emergency provision for so-called "provisional arrests" by the requested government, to hold a fugitive until the supporting evidence can be delivered. See Article 11. The treaty provides that either country *may* decline to extradite its own citizens, and in such cases must submit the criminal case to domestic authorities for the purpose of prosecution. See Article 9.[10] The treaty also limits extradition for extraterritorial offenses. For a crime committed on Mexican soil where the United States is the requesting Party, extradition need be granted only if the laws of Mexico would reach a similar offense committed on United States soil, or if the fugitive is a national of the United States. See Article 1(2). The United States and Mexico agreed to each of these terms in the 1980 exchange of ratifications.

There would be no point to an extradition treaty's elaborate specification of the procedures and standards which the requested country may require of the requesting country, if those protections could be freely evaded by the requesting country's employment of armed men to abduct the defendant.

A recent example from the United States-Canada Extradition Treaty may be instructive. In February 1992, under the United States-Canada treaty, Canada agreed to surrender a Canadian citizen to the courts of Florida, but required assurances that the death penalty would not be imposed for

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10. Under the 1862 treaty, the United States routinely declined to extradite Americans to Mexico, because it lacked authority under United States law. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 13-16 (1936); *see also John Bassett Moore, Report on Extradition with Returns of All Cases* 207-08 (1890). The 1899 treaty recast the provision for the surrender of nationals, creating power in the American Executive to surrender American nationals after judicial scrutiny of the evidence, but imposing no obligation to do so.

the particular offense. The right to so restrict the surrender of a fugitive was agreed to by the United States in article 6 of the Canadian treaty.[11] Under the logic of the petitioner's argument in this Court, the United States could instead have sent agents into Canada to abduct the defendant, and would have remained free to impose a penalty no longer permitted by Canadian law.

"Kidnapping" and "abduction" are high on the list of crimes subject to extradition under the 1980 United States-Mexico treaty.[12] It is startling to suppose that the treaty allows a signatory to use abduction, when abduction itself is announced as a crime subject to extradition and punishment under the self-same treaty.

Secretary of State James Blaine, who administered relations under the first United States-Mexico extradition treaty in the nineteenth century, described the purpose served by the extradition treaty in safeguarding residents from abrupt and unexplained removals from their own countries.

> The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and *does not authorize* either party, *for any cause*, to deviate from those forms or *arbitrarily abduct from the territory, of one party, a person charged with crime, for trial within the jurisdiction of the other.*[13]

In 1887, Secretary of State Thomas Bayard spoke of government-sponsored abductions in the same light, as a clear

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11. *See* Treaty of Extradition, United States-Canada, art. 6, 27 U.S.T. 983, T.I.A.S. No. 8237 (signed June 28 and July 9, 1974; entered into force, Mar. 22, 1976); N.Y. Times, Feb. 14, 1992, at A3, cols. 1-3.

12. 1980 Extradition Treaty, *supra* note 1, art. 2(1) ("Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix . . . ."); & Appendix to 1980 Extradition Treaty, cl. 4 (including "Kidnapping; child stealing; abduction; false imprisonment" as extraditable crimes).

13. Letter of Secretary of State James Blaine to O.M. Roberts, Governor of Texas (May 3, 1881) (emphasis added), in *Domestic Letters of the Department of State, 1784-1906* (National Archives Microfilm Publication M40, Roll 93); *also excerpted in* 4 *John Bassett Moore, A Digest of International Law* 330 (1906).

violation of the extradition treaty. When Francisco Arresures was seized in Texas by three local deputy sheriffs and a Mexican police officer, and was forced across the border to Mexico without observing extradition treaty processes, Bayard complained that Arresures' return to Mexico was "obtained not in accordance with, but *in fraud of existing treaties.*"[14]

The recorded views of Secretary Blaine and Secretary Bayard indicate that the Department of Justice is simply wrong in asserting (Pet. Br. at 9) that "nothing in [the treaty's] history, suggests that it regulates apprehensions made without invoking the treaty's terms." Secretary Blaine and Secretary Bayard's consistent view that extradition treaties prohibit government-sponsored abductions matches common sense. It is the central tenet of an extradition treaty that each country's exclusive jurisdiction over its own territory will be respected. Otherwise, there would be no need for formal extradition in the first place—bands of Mexican

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14. Letter of Secretary of State T. F. Bayard to Thomas C. Manning (February 26, 1887), in *Diplomatic Instructions of the Department of State, 1801-1906, Mexico* (National Archives Microfilm Publication M77, Roll 117). Secretary of State Bayard denounced the "kidnapping" of defendant Arresures and his "forcible transportation to Mexico." The hazards for all concerned in the disregard of appropriate legal process are also illustrated by the outcome of the Arresures case: defendant Arresures was killed during the incident. His abductors alleged self-defense, but Secretary of State Bayard was skeptical of the claim.

See also Statement by Secretary of State George Shultz to the Florida Probation and Parole Commission, *reprinted in* Leich, *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l L. 207, 208 (1984), concerning the claim of Canadian citizen Sidney L. Jaffe that he was kidnapped by agents of the State of Florida while in Canadian territory. Observed Secretary Shultz:

> The United States has an extradition treaty with Canada. That treaty could have been utilized to secure Mr. Jaffe's return . . . .
>
> . . .
>
> As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, *it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.*

Id. (emphasis added).

police could invade Texas to recapture Mexican or American fugitives, and vice versa.[15]

The first United States-Mexico extradition treaty in 1862 followed lengthy negotiations between the United States and Mexico. Its preamble clearly recognized the territorial sovereignty of both of the signatories:

> The United States of America and the United Mexican States, having judged it expedient, with a view to the better administration of justice and to the prevention of crimes *within their respective territories and jurisdictions*, that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, should, *under certain circumstances*, be reciprocally delivered up, have resolved to conclude a Treaty for this purpose . . . .[16]

The language of the modern 1980 Extradition Treaty also recognizes the territorial jurisdiction of each contracting party. Article 4(1) defines the term "territory of a Contracting Party." Article 20 of the 1980 Extradition Treaty expressly recognizes the right of each country to deny the other access to its own national territory for the transport of prisoners surrendered by a third State. Article 14 makes plain that the decision to grant extradition belongs to the territorial sover-

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15. *See Samuel T. Spear, The Law of Extradition* 70-74 (Albany 1884): The necessity for extradition grows out of the fact that, *except in cases specially provided for by treaty*, the penal laws of one country cannot operate within the jurisdiction of another. The sovereignty of a nation within its own territory is exclusive and absolute. . . . In truth, the criminal, by his flight to another State, becomes (although but for a time) the subject of the supreme power of that State, and immediately enjoys the protection and guardianship of that State. *From that guardianship he cannot be forcibly taken, except under special agreement*, the terms of which, we presume, certainly do not extend further than to those very grounds on which the surrender was demanded and granted.

See also Theodore Woolsey, Introduction to the Study of International Law 179 (1860).

16. 1862 Extradition Treaty, *supra* note 8, preamble (emphasis added); *accord* 1899 Extradition Treaty, *supra* note 8, preamble.

eign; it requires a statement of reasons for any decision not to extradite, and provides that no surrender of a person may take place on national territory without the consent of competent national authorities.

The brief of the Department of Justice claims the absence of any article in the 1980 treaty stating *in haec verba* that the national territory of the treaty parties will be respected. (Pet. Br. 23). But, as noted above, the language of the treaty recognizes territorial sovereignty throughout its text. An extradition treaty sets the conditions under which a foreign state *may demand as of right* the surrender of a fugitive criminal from the domestic territory of another state. Thereby, the treaty parties have plainly agreed that when those conditions are not met, fugitive surrenders need not be made. As the Supreme Court noted in *Factor v. Laubenheimer*, "the principles of international law recognize no right to extradition apart from treaty." 290 U.S. 276, 287 (1933).

The joint communique and public statements of the United States and Mexico in August 1989 affirmed the three-fold purpose of extradition treaties — to fight crime, while safeguarding sovereignty and civil liberties.[17] Petitioner's present narrow view of the purposes of extradition treaties (Pet. Br. 25) is inconsistent with this record.

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17. *See* Statement of Mexican Attorney General Alvarez del Castillo at Joint News Conference with U.S. Attorney General Richard Thornburgh, U.S. Secretary of State James Baker, Mexican Secretary of State Solana, and others (Aug. 7, 1989), *reprinted in* 29 I.L.M. 21, 22 (1990), *also in* 89 U.S. Dept. of State Bull. 78 (No. 2151) (Oct. 1989) ("What we discussed was . . . what Attorney General Thornburgh has said: a review of the [extradition] treaty with, I believe, both parties' intention of making it faster and more efficient when prosecuting infractions of all types, *while protecting the basic freedoms of citizens of the United States as well as of Mexico.*"); Joint Communique, United States-Mexico Binational Commission, Aug. 7, 1989, *in* 29 I.L.M. 18, 19-20 (1990), *also in* 89 U.S. Dept. of State Bull. 82 (No. 2151) (Oct. 1989) ("*Conscious of the need for respect due to each country's sovereignty*, the sides considered important legal questions with a view to cooperating in the fight against criminal actions having international effects. In this context, both delegations agreed: . . . To analyze the possibility of ensuring more effective application of the current extradition treaty.").

The text of a treaty is also to be interpreted against the general background of international law.[18] Under the deepest norms of international law, the jurisdiction to apprehend offenders is limited to the political government that is sovereign in a particular country, and this standard is incorporated into the 1980 Extradition Treaty.[19]

The good faith with which extradition treaties are to be read was emphasized in *United States v. Rauscher*, 119 U.S. 407 (1886). The Department of Justice argued in *Rauscher* that Great Britain had failed to insert any express term in the Webster-Ashburton Treaty to forbid the trial of a defendant on a second charge (never presented to the British extradition judge) once the defendant was brought to the United States.[20] There was indeed no term that expressly forbade trial on a second charge. The Supreme Court held, against the Solicitor General's objection, that trying the prisoner on a second charge without the consent of Great Britain would

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18. *See* Vienna Convention on the Law of Treaties, art. 31 ("General rule of interpretation"), U.N. Doc. A/Conf. 39/27, *reprinted in* 8 I.L.M. 679 (1969). The Vienna Convention on the Law of Treaties is "generally recognized as the authoritative guide to current treaty law and practices." *See* Letter of Submittal by the Secretary of State to the President, in S. Exec. Doc. L, 92d Cong., 1st Sess. at 1 (1971), *also quoted in American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States*, pt. 3, intro. note.

19. *See American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States* § 432(2) (1987) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); *id.* § 432 comment b ("*Territoriality and law enforcement.* It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent."); *L. Oppenheim, International Law: A Treatise* § 125, at 179-80 (1912) ("The duty of every State itself to abstain and to prevent its agents and subjects from any act which contains a violation of another State's independence or territorial . . . supremacy is correlative to the respective right of the other State. . . . a State is not allowed to send . . . its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission.").

20. *See* Webster-Ashburton Treaty, United States-Great Britain, art. 10 (signed August 9, 1842; entered into force October 13, 1842), 8 Stat. 572, T.S. No. 119.

violate the "manifest scope and object of the treaty." 119 U.S. at 422. *Rauscher* may be explained, petitioner now suggests (Pet. Br. 18) "in light of specific terms in the . . . Treaty *that required the presentation of evidence on the particular crime for which extradition was sought.*" That is just the point — in *Rauscher* and in *Alvarez-Machain.* A defendant is guaranteed that his own national authorities will be permitted to examine the charge and the evidence warranting binding-over before he is tried in another country.

The same principle in interpreting treaties, to give force to the full understanding of the parties, was observed in *Cook v. United States*, 288 U.S. 102, 108 (1933), a case concerning American seizure of a foreign vessel for a smuggling offense, beyond one hour from shore. The Solicitor General, advancing arguments "not of the Department of Justice but of the lawyers for the Government," 288 U.S. at 112 n. 3, suggested that the treaty with Great Britain did not contain any explicit language promising that the United States would refrain from seizing British vessels this far out from shore. The treaty, said the United States, only promised that Great Britain would "not protest" seizures *within* the one hour range. The Supreme Court rejected this crab-like reading of the treaty.

> *The [Government's] argument is that the Treaty settled the validity of the seizure only for those cases where it was made within the limits described in the Treaty;* and that since this seizure was made beyond one hour's sailing distance from the coast the Treaty did not apply. In construing the Treaty its history should be consulted. . . . The history reveals that serious differences had arisen between the two Governments . . . and that, for the purpose of resolving them, *the parties determined to deal completely with the subject of search and seizure, beyond our territorial limits*, of British vessels suspected of smuggling liquors."

288 U.S. at 111-12 (emphasis added, footnote omitted). In *Cook*, the Supreme Court's regard for the full understanding of the treaty was striking, because the Congress had previously authorized seizures beyond one-hour's sail. In the instant

case, the seizure of a foreign citizen on foreign soil without the consent of the foreign country has *never* been authorized by the Congress.[21]

The petitioner's suggestion that there is no treaty term prohibiting state-sponsored kidnapping in Mexico (Pet. Br. 23) — apart, of course, from the inclusion of kidnapping and abduction in the list of crimes punishable under the treaty — and that the treaty is not "invoked" in an abduction (Pet. Br. 27) completely disregards the original purpose of the extradition treaties, in settling affairs along the border. The United States-Mexico extradition treaties arose from a need to stop the vigilante and posse raids that were taking place back and forth across the United States-Mexico border. Seeking an extradition treaty in 1850, President Millard Fillmore said to the Senate, "The length of the boundary line between the two countries, extending as it does from the Pacific to the Gulf, renders such a convention indispensable to the maintenance of good order and the amicable relations now so happily subsisting between the sister republics."[22]

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21. *See, e.g.*, Exchange between Assistant Counsel James Dempsey and then Assistant Attorney General William Barr, *Hearing Before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary* (Nov. 8, 1989), 101st Cong., 1st Sess., at 66, *reprinted in Cong. Info. Serv.* 91-H521-45:

> **Mr. Dempsey:** Now, in exercising jurisdiction over crimes committed abroad, under the provisions of [a] statute[,] would you consider it relevant that Congress declined to authorize self-help?
>
> **Mr. Barr:** If I was considering that statute as a source of authority, obviously that would be relevant.

22. Statement of Millard Fillmore, July 20, 1850, *quoted in John Bassett Moore, A Treatise on Extradition and Interstate Rendition*, *supra* note 8, at 97. *See, e.g., Case of 1881*, in *id.* at 287 ("Texas sheriff, accompanied by three men, had crossed from Tombstone, Arizona, into Mexico, and there captured a fugitive criminal, whom they had taken back into Arizona without any form of law." Secretary of State requested Secretary of Interior "to direct that proper measures be taken by the Territorial authorities for the punishment of any guilty parties, and *for the future maintenance of law and treaty obligations in such matters*." Mexico did not request release of criminal.) (emphasis added); *see also* Note of Mexican Minister Zamacona to Secretary of State James Blaine (July 25, 1881), in *Notes from the Mexican Legation to United States Department of State 1821-1906* (National Archives Microfilm Publication M54, roll 19) (Tombstone sheriff and

The history of United States-Mexico extradition treaties suggests:

> (1) The state parties have sought increasing *national and judicial* safeguards in scrutinizing fugitive surrender.[23]
>
> (2) The state parties have relied upon *renegotiation* of the terms of the treaty when existing arrangements were inadequate.[24]

By its plain language, structure, and history, the 1980 Extradition Treaty clearly contemplates that the treaty parties will not seek to evade its terms by sponsoring abductions of the other's citizens. The United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion

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three men returned with fugitive from Mexico "without complying with the formalities prescribed by the extradition treaty.").

23. The increasing concern for national and judicial scrutiny of fugitive surrenders may be seen in the gradual exclusion of local border authorities from the extradition process. In the 1862 treaty, surrender of fugitives could be made through diplomatic channels or, in the case of crimes committed in border states or territories, through the local civil or military authorities. In the 1899 treaty, the competence of border authorities was reduced; before surrender across the border could proceed, a record of judicial examination of the fugitive had to be made and "forwarded to the proper executive authority of the United States of America or of the United Mexican States, as the case may be," for determination whether "according to the law and the evidence, the extradition is due pursuant to the terms of this convention."

The 1980 Extradition Treaty *eliminated* any delegation of authority to border officials. Extradition demands must be presented through diplomatic channels, with provisional arrests available in cases of "urgency." 1980 Extradition Treaty, *supra* note 1, arts. 10 & 11. Surrenders across the border must be preceded by judicial scrutiny.

24. *Id.*, art. 13. In the course of the United States-Mexico treaty relationship, the scope of crimes subject to extradition also has been modified and expanded by supplementary agreements. The 1903 Supplementary Convention added the crime of bribery. The 1926 Supplementary Convention added "[c]rimes and offenses against the laws for the suppression of the traffic in and use of narcotic drugs," smuggling, and crimes involving injurious or poisonous chemicals. The 1941 Supplementary Convention added the criminal acts of "an accessory before or after the fact." *See supra* note 8.

that any different understanding was reached with Mexico.[25] There is also no indication in the record that Mexico has declined any properly supported United States request for prosecution or extradition of Alvarez-Machain.

Some extradition treaties provide for the mandatory extradition of national citizens. *See, e.g.*, Treaty of Extradition, United States-Ireland, art. 1, T.I.A.S. No. 10813 (signed July 13, 1983; entered into force Dec. 15, 1984). In other cases, as with Mexico, France, and Germany, the United States has rested with the guarantees of a "prosecute or extradite" term for nationals — each signatory promises that upon a proper evidentiary showing, criminal defendants will be prosecuted by national authorities if extradition is not granted.[26] These guarantees of the right to decline extradition of one's own citizens are as important to the United States as to the foreign signatories; there will be occasions when the United States does not wish to subject its citizens to the rigors of foreign trial or a foreign jail. Yet under the Government's new view, this important guarantee can be evaded by the "self-help" of foreign abductors.

American drug enforcement agents need not breach United States treaty promises if present treaty terms are unsatisfactory. Treaty terms can be renegotiated. The *ex post facto* clause does not limit extradition treaties; a renegotiated treaty can be applied to crimes and offenses committed previously.[27]

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25. A letter drafted *after the event* by the newly appointed Legal Advisor to the State Department, setting out the Department's new interpretation for the purposes of this litigation, is no substitute for this missing evidence from the negotiating process. *See* Letter from Edwin D. Williamson to Attorney General Richard Thornburgh (Sept. 26, 1990), *reproduced in* Addendum of the Appellant United States at 68, United States v. Alvarez-Machain, No. 90-50459 (9th Cir. 1990).

26. *See* Treaty of Extradition, United States-France, art. 5, 37 Stat. 1526, T.S. No. 561 (signed Jan. 6, 1909; entered into force July 27, 1911), and Supplementary Treaty, United States-France, art. 3, 22 U.S.T. 407, T.I.A.S. No. 7075 (signed Feb. 12, 1970; entered into force Apr. 3, 1971); Treaty of Extradition, United States-Germany, art. 7, 32 U.S.T. 1485, T.I.A.S. No. 9785 (signed June 20, 1978; entered into force Aug. 29, 1980).

27. *See, e.g.*, 1980 Extradition Treaty, United States-Mexico, *supra* note 1,

Mexican law also seems to allow the Mexican government to grant extradition beyond the scope of the treaty; the treaty serves to define what the United States may demand *as of right*; Mexican statute law further describes what the Mexican national government may allow as a matter of discretion.[28] In such cases, the Mexican statute provides procedural protections for the fugitive comparable to those in a treaty request, and requires that the requesting country be willing to surrender fugitives in like circumstances.[29] The resort to kidnapping by agents of the Drug Enforcement Administration thus bypassed other available routes for seeking effective prosecution of foreign fugitives.[30]

II. The 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs also prohibits government-sponsored abductions.

On December 20, 1988, the United States signed the

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art. 22(1) ("This Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force."); *see also* Supplementary Extradition Treaty, United States-United Kingdom, -- UST --, TIAS No. -- (signed June 25, 1985; entered into force Dec. 23, 1986), *also in* 24 I.L.M. 1105-09 (1974).

28. Ley De Extradición Internacional, arts. 1, 3, 14, 16 & 36, El Diario Oficial de la Federación (Dec. 29, 1975), *also reprinted in Códigos de Procidimientos Penales*, *supra* note 9, at 36.

29. *Id.*, art. 10. In American law, delivery of foreign fugitives beyond the mandatory requirements of the treaty would require statutory authority from the Congress, except where a fugitive may be subject to deportation under American immigration laws. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936) ("There is no executive discretion to surrender to a foreign government, unless that discretion is granted by law. . . . It must be found that statute or treaty confers the power."); *see also* Remarks of Senator Helms, 135 Cong. Rec. S11617 (Nov. 21, 1989; legislative day Nov. 6, 1989) ("In the past 150 years, the United States has only engaged in extradition with those countries with which the United States had extradition treaties. In other words: No treaty — no extradition.").

30. Upon the repatriation of defendant Alvarez-Machain to Mexico pursuant to Judge Rafeedie's order, the United States also could request the Government of Mexico to detain Alvarez-Machain under Articles 9 and 11 of the 1980 Extradition Treaty, while legally sufficient documentation for his lawful extradition or his prosecution in Mexico is assembled and submitted to the Mexican government and courts by the United States.

Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[31] This treaty states in its preamble that it is a "comprehensive . . . convention . . . directed specifically against illicit traffic" in drugs. The 1988 Vienna Convention was approved by the Senate on November 6, 1989,[32] and was ratified by the United States on February 20, 1990,[33] before the DEA agents' abduction of Alvarez-Machain took place, and the treaty came into force on November 11, 1990.[34] The 1988 Vienna Convention requires signatories to prosecute and penalize drug offenses, and adds a comprehensive list of drug offenses to all previously existing bilateral extradition treaties. Article 6 recognizes the right of each party signatory to decline to extradite its own nationals.[35]

Most tellingly, Article 2(3) of the multilateral 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs also provides that

> A party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the author-

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31. The text of the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/15 (opened for signature Dec. 20, 1988), is set out at 28 I.L.M. 493 (1989).

32. 135 Cong. Rec. S16616 (Nov. 21, 1989, legislative day Nov. 6, 1989).

33. *See* Multilateral Treaties Deposited With the Secretary General: Status as at 31 December 1990, at 277 (United Nations 1991).

34. *Id.* Mexico signed the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on February 16, 1989, and deposited its ratification on April 11, 1990. *Id.* at 276.

35. Statement of Attorney General Richard Thornburgh to the Senate Drug Caucus, *reprinted in* 135 Cong. Rec. S16618, S16620 (Nov. 21, 1989; legislative day of Nov. 6, 1989) ("The United States had hoped to include a broad obligation to extradite one's own nationals . . . there was overwhelming opposition from the northern European countries that, for either political or legal reasons, would not accept any provision on the extradition of their nationals, even a hortatory provision. . . . The article does, however, obligate a party to submit the case to its competent authorities for the purpose of prosecution when it refuses to extradite an offender because the offender is one of its nationals or because the offense occurred on its territory or on its vessel or aircraft.").

ities of that other Party by its domestic law.[36]

The 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs thus reaffirms the long-time understanding of the United States of the obligation to refrain from violating the domestic sovereignty of an extradition treaty partner, especially in the area of narcotics addressed in this "comprehensive" convention.

The 1988 Vienna Convention was already ratified by the United States at the time that the several DEA agents involved in this case solicited and paid for the abduction of Alvarez-Machain. Under the Vienna Convention on the Law of Treaties, a state that has ratified a treaty is obliged "to refrain from acts which would defeat the object and purpose of the treaty," pending its entry into force.[37] This obligation also arises upon signing a treaty.[38] Both Mexico and the United States were signatories to the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs *before* the kidnapping of Alvarez-Machain.

III. The United States District Court lacks jurisdiction to try a defendant brought before it by government-sponsored kidnapping, where the treaty violation has not been cured by consent. To do otherwise, would involve the Court in a continuing violation of international law.

The view that American extradition treaties forbid the exercise of domestic criminal jurisdiction when state-sponsored abduction has been used to obtain the defendant and the foreign state has objected, is supported by the authoritative *Harvard Research in International Law*, 29 Am. J. Int'l L. 1 (Supp. 1935). This project—directed by Manley O. Hudson,

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36. At the Vienna Conference on December 13, 1988, the United States delegate endorsed draft Article 2(3) (then numbered 1(3)). *See* 2 Official Records of the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988, at p. 171 (Committee I, 28th meeting, Dec. 13, 1988).

37. *See* Vienna Convention on the Law of Treaties, *supra* note 18, art. 18(b).

38. *See id.* art. 18(a).

professor of law at Harvard Law School, later judge of the Permanent Court of International Justice, and Chairman of the International Law Commission — was advised by an extraordinary group of American constitutional and international lawyers, including Elihu Root and Learned Hand.[39]

The Harvard Study of Jurisdiction with Respect to Crime set out the following rule for criminal jurisdiction:

> Article 16. Apprehension in Violation of International Law
>
> In exercising jurisdiction under this Convention, *no State shall prosecute or punish any person who has been brought within its territory* or a place subject to its authority by recourse to measures *in violation of* international law or *international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.*

Id. at 623. The Reporter's Comment noted as follows:

> In the United States, for example, *the law is in accord with this article* in cases in which a person has been brought within the country by recourse to measures *in violation of an international convention.*

Id. at 624 (emphasis added). The Comment cited *Cook v. United States*, 288 U.S. 102 (1933), *Ford v. United States*, 273 U.S. 593 (1927), and *United States v. Rauscher*, 119 U.S. 407 (1886), and remarked the "noteworthy language" of *United States v. Ferris*, 19 F.2d 925 (N.D. Cal. 1927), that described the "complete lack of jurisdiction" in cases where

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39. The Advisory Committee to the project was chaired by George W. Wickersham, former Attorney General of the United States and President of the American Law Institute, and included Frederic R. Coudert, Esq.; Green H. Hackworth, Legal Adviser of the Department of State; Judge Learned Hand of the United States Court of Appeals for the Second Circuit; former Secretary of State Elihu Root; and James Brown Scott, president of the American Society of International Law, director of the Division of International Law of the Carnegie Endowment for International Peace, and later Legal Adviser to the Department of State.

a person was seized by a state party in violation of an international convention.

In *United States v. Cook*, as we have seen, the Supreme Court declined the suggestion that the United States was free to seize a British vessel for smuggling contraband beyond a one-hour limit from shore. The Supreme Court also held that the federal courts had responsibility to enforce the treaty's implicit jurisdictional limits. The Supreme Court rejected the Solicitor General's suggestion that one should distinguish between the initial illegal custody by the Coast Guard that effected the seizure and subsequent custody by the marshal of the District Court:

> Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. *To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare United States* v. *Rauscher*, 119 U.S. 407.

288 U.S. at 121-22 (emphasis added).[40] The Solicitor General does not suggest that *Cook* should be overruled. Yet under the Department of Justice's theory, a foreign ship would have more treaty protection in court than a foreign citizen.

Similarly, *United States v. Ferris* involved the criminal prosecution of crew members of a Panamanian flag vessel, seized 270 miles off the west coast of the United States. In sustaining the individual defendants' objection to the criminal jurisdiction of the District Court over their persons, Judge Bourquin said:

> It seems clear that, if one legally before the court cannot be tried because therein a treaty is violated [as in *Rauscher*], for greater reason *one illegally before the court, in violation of a treaty, likewise cannot be*

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40. The illegal seizure in violation of the treaty deprived the District Court of jurisdiction over the vessel, even though the Court could have taken subject matter jurisdiction of an attempt to smuggle goods into the United States pursuant to a legal seizure of the vessel.

> *subjected to trial.* Equally in both cases is there absence of jurisdiction.

19 F.2d at 926 (N.D. Cal. 1927) (emphasis added).

This reading of the extradition treaty is not only faithful to its text and intention. It also will aid the safety of American citizens, as much as Mexican nationals. As the history of our relations with Mexico and Canada make clear, abductions can occur in both directions across a border.

Petitioner errs in characterizing treaty limits on personal jurisdiction as judicial creation of a "cause of action" or balancing of interests.[41] Rather, it is a matter of a court's traditional responsibility to ascertain its own jurisdiction, a task at the center of the judicial function. Article VI of the United States Constitution makes a treaty "the supreme Law of the Land," and a similar supremacy clause is found in Article 133 of the Mexican Constition.[42] An American court cannot avoid the question whether the exercise of its own jurisdiction is consistent with the treaty. Indeed, if the 1980 Extradition Treaty were not self-executing and did not limit judicial jurisdiction, it is hard to imagine what the United States Government could do to abate the proceedings if an American state or local law enforcement official decided to kidnap a defendant across national borders and put him on trial in an American state court. Article VI of the Constitution makes a treaty "the supreme Law of the Land" for state and federal officials alike.

A person abducted by state agents in violation of a treaty is entitled to be restored to his own nation.[43] Where a court declines to exercise personal jurisdiction over a defendant, because the defendant was forcibly brought before the court in violation of a treaty obligation, the court merely fulfills its

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41. Brief of Petitioner United States, at 35, 40.

42. *See* Constitution of Mexico, art. 133, *reprinted in* 10 *Constitutions of the Countries of the World* (A. Blaustein & G. Flanz eds. 1988).

43. *See American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States* § 432 comment c (1987) ("If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned.").

obligation not to commit or extend an international delict.[44] A defendant is detained for trial by order of the court, not by the Attorney General acting in his own exclusive province. If a North American were kidnapped by agents of a Latin American country and put on trial in a Latin American courtroom, the responsibility for his return and the continuing wrongful character of his detention would not cease merely because he was forced over the frontier into the abductor's territory.

The intimate involvement of the judiciary in the administration of extradition treaties has also been set by the Congress itself, which delegates to federal judges the authority to refuse foreign extradition if the required factual showing and legal requisites of the extradition treaty are not satisfied. 18 U.S.C. § 3184 (1988).[45] A court's determination of its

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44. *Cf. Peter Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* 3 n. (Philadelphia 1824) (emphasis omitted):

> The law of nations, being the common law of the civilised world, may be said, indeed, to be a part of the law of every civilised nation. . . . It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction is bound to administer it. Whether there is or not a national common law in other respects, this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.

See also Note from Secretary of State Hamilton Fish to British Minister Edward Thornton (Jan. 10, 1877) (emphasis added), *in Notes to Foreign Legations in the United States from the Department of State 1834-1906, Great Britain* (National Archives Microfilm Publication M99, Roll 46) ("the recapture and removal of the prisoner [Peter Martin] from the jurisdiction of the United States to British soil was an illegal, violent, and forcible act, *which cannot justify the subsequent proceedings whereby he has been, is, or may be restrained of his liberty.*"); *also in* 1 *John Bassett Moore, A Treatise on Extradition and Interstate Rendition, supra* note 8, at 286; *and in* 1877 *Foreign Relations of the United States* 266-71.

45. *See In re* Mackin, 668 F.2d 122, 135 (2d Cir. 1981) (Friendly, J.) (citing late eighteenth century "perception that extradition without judicial oversight was 'highly dangerous to liberty and ought never to be allowed in this country.'"); Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J.

jurisdiction to try a criminal case is not an intrusion on any prerogative of the executive. The centrality of the courts in enforcing extradition treaties is also shown by the suggestions of Secretaries of State and Attorneys General that a defendant should seek a judicial remedy before resorting to diplomatic recourse.[46]

IV. *Ker v. Illinois* and *Frisbie v. Collins* are not applicable. *United States v. Noriega* is wholly distinct, for Panama did not object to the arrest of Noriega, and the transfer of Noriega took place during a period of armed hostilities pursuant to Presidential order.

The petitioner suggests that reversal is mandated by *Ker v. Illinois*, 119 U.S. 436 (1886), and the domestic law rule of *Frisbie v. Collins*, 342 U.S. 519 (1952). These cases do not support the proposed deference to the DEA in matters of liberty and judicial jurisdiction.

Ker was decided the same day as *Rauscher*, and written by the same Justice, Samuel Miller. Harvard historian Professor Charles Fairman noted in his famous article *Ker v. Illinois Revisited*, 47 Am. J. Int'l L. 678, 682 (1953), that *Ker* came

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229 (1990).

46. *See, e.g., Case of Edward Underwood*, in 4 *John Bassett Moore, A Digest of International Law*, *supra* note 13, at 318 (prisoner extradited from Canada on murder charge, acquitted, then rearrested and convicted on two charges of robbery. British ambassador was advised by the United States that "*as the question was of a judicial nature, there were no steps to be taken to fulfill the obligations of the treaty except through the appropriate judicial proceedings*") (emphasis added); *accord* Opinion of Attorney General John W. Griggs (Mar. 27, 1901), 23 Op. Att'y Gen. 431, 434.

See also *Case of Henry Acosta*, in 4 *John Bassett Moore, A Digest of International Law*, *supra* note 13, at 318-19 n.; *and in* Opinion of Attorney General Philander Knox (Dec. 24, 1901), 23 Op. Att'y Gen. 604, 607 (defendant Acosta extradited from Mexico for offense, convicted, served sentence, and on day of release was rearrested for another offense committed prior to his extradition. Attorney General Knox said, "I do not mean to intimate that his only resort is to the courts, or that if they deny him any rights which he may possess, the Federal Government is powerless or free from obligation to interfere . . . . *My present opinion is only intended to intimate that his primary resort is to the courts.*") (emphasis added).

before the Supreme Court upon the limited scope of review permitted by a writ of error.[47] The Court considered only Ker's claim that he had a right of asylum in Peru despite the *willingness* of the legitimate government of Peru to have him be tried in the United States for financial crimes committed on American soil. A review of the diplomatic notes received from Peru between January 1, 1883 through January 1, 1887 shows *no objection* was made by Peru to the exercise of criminal jurisdiction by the Illinois courts in *Ker*.[48] This was a finding of fact by the Illinois court as well.[49] Equally importantly, at the time that Ker was seized in Lima, that city was occupied by the armed forces of Chile. The Pinkerton agent who was seeking Ker applied to Admiral Lynch of the Chilean forces, and the Admiral agreed to release defendant Ker for return to the United States. *See* Statement of George Hunt, Attorney General of Illinois, in Brief for Defendant in Error, Ker v. Illinois, *reprinted in* Fairman, *supra*, 47 Am. J. Int'l L. at 684-85.[50] *Ker* thus involved a voluntary surrender of a defendant by the controlling territorial sovereign.

In contrast, the government of Mexico has consistently objected to the exercise of criminal jurisdiction by the United States, and has demanded the return of the defendant Alvarez-Machain.

In addition, *Ker* involved a private Pinkerton agent who had been authorized by the federal government and the State of Illinois only to make a formal treaty demand on the

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47. *See* Revised Statutes § 709 (1875).

48. *See Notes from the Legation of Peru, 1827-1906* (National Archives Microfilm Publication T802).

49. *See also* Ker v. Illinois, 110 Ill. 627, 640 (1884) (Scott, J.) ("*if the government of Peru does not complain* of the arrest of defendant within its jurisdiction, as an infraction of international law, it does not lie in the mouth of defendant to make complaint on its behalf.") (emphasis added).

50. Professor Fairman noted:

> *the military governor was indeed the authority competent to surrender* a fugitive present in the occupied territory. . . . Accepting as accurate the factual recital of the [Illinois] Attorney General, there was no invasion of Peruvian sovereignty or other breach of international law.

Fairman, *supra*, 47 Am. J. Int'l L. at 685-86 (footnotes omitted, emphasis added).

government of Peru. The Pinkerton agent's actions in obtaining custody of Ker, by treating with the occupying forces of the government of Chile, was undertaken without the knowledge or authority of prosecuting authorities of either Illinois or the United States government. Again, in contrast, the District Court found that the abduction of Alvarez-Machain was undertaken with the prior knowledge, approval, and promised reward of Special Agents of the United States Drug Enforcement Administration.[51]

Finally, in *Ker v. Illinois*, the extradition treaty reserved to Peru no discretion to refuse delivery, except for the required evidentiary showing. Ker was an American national charged for a larceny committed on American soil.[52] The United States agreed in 1980 that Mexico and the United States would retain the right to refuse to surrender their own nationals.

The facts and law of the case of Alvarez-Machain arise under the bilateral United States-Mexico treaty, and are also distinct from American domestic removal of a defendant from, for example, the state of Texas to the state of California. The domestic transfer of defendants within the American

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51. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 603 & n.7 (C.D. Cal. 1990). Lower court decisions since *Ker* have concerned situations distinct from the present case: either the foreign government made no protest under the extradition treaty, or a private individual acted on his own without prior authorization from United States officials. For example, in the 1905 incident of Antonio Martinez, see Pet. Br. at 28 & n. 23, the fugitive was taken from Mexico by a private party. The abductor, Antonio Felix, was extradited by the United States to Mexico for full punishment—hardly imaginable if the abduction had been carried out at the request of United States officials. As Hackworth observes, the Martinez case fell into the distinct category of "breaches by private persons." *See* 2 *G.H. Hackworth, Digest of International Law* § 152, at 321 (1941).

52. *See* Brief for Defendant in Error, at 17-19, *Ker* v. *Illinois*:

> The effect upon Ker of the acts complained of is identical with what would have happened him if Peru had discharged her treaty obligation. . . . If every act, from the moment of his capture, is declared illegal, and Ker returned to the place whence he was taken, it will, at that instant, be the duty of Peru to surrender him to the United States for trial. Two more trips across the sea would be the outcome to Ker of this extraordinary venture.

union is governed by Article IV, Section 2 of the United States Constitution, by federal statute, 18 U.S.C. § 3182, and by state laws frequently patterned on the Uniform Criminal Extradition Act, 11 U.L.A. 51 (1974). The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* correctly notes that the protections available in domestic transfers of fugitives are less rigorous than in international extradition.[53] These lessened standards make sense in a domestic setting, since all state court proceedings are governed by the basic protections of constitutional due process, and a person is not removed from his own nation.

In international extradition the problem is quite distinct, for the requested country may properly wish to assure itself of the evidence supporting another country's request, and there are often differences in the basic procedures of trial.[54] The protections appropriate to regulate the extradition of defendants between foreign jurisdictions, need not apply in domestic criminal process. *See* Frisbie v. Collins, 342 U.S. 519 (1952); Gerstein v. Pugh, 420 U.S. 103 (1975).

This case is also wholly distinct from the matter of

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53. *See American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States*, § 478 reporters' note 8 (1987). For example, the double criminality rule, requiring that the conduct be a crime under the laws of both countries, and the doctrine of specialty, requiring that the defendant be tried only for the crime for which extradition is granted, do not apply between States of the Union. Similarly, in domestic deliveries, "the arrest warrant is issued by the governor of the requested state, not by a magistrate; and, in general, judicial scrutiny of the extradition request is narrower than in international extradition." *Id.* Unlike international extradition, in domestic fugitive delivery there is no inquiry by the courts of the requested state into the criminal evidence supporting the claim of the requesting state.

54. Secretary of State Thomas Jefferson warned of the special need for safeguards in international extraditions. *See* Thomas Jefferson, Heads of consideration on the establishment of Conventions between the United States and their neighbors for the mutual delivery of Fugitives from Justice (Mar. 22, 1792), in 23 *The Papers of Thomas Jefferson* 328, 329 (C. Cullen ed. 1990). Jefferson also counseled against seeking the informal return of fugitive criminals from Spanish Florida, for fear we would be required to reciprocate. *See* Letter from Thomas Jefferson to George Washington (Nov. 7, 1791), in 22 *id.* at 266.

General Manuel Noriega and Luis Del Cid who were brought to the United States following their capture in the United States invasion of Panama. First, and crucially, the Government of the Republic of Panama has *not objected* in any form to the seizure and arrest of these two defendants, nor has it suggested there was any violation of Panamanian sovereignty. The United States has placed this fact on the record in the Miami prosecution pending against Noriega and Del Cid.[55] Secondly, the armed forces of the United States, acting pursuant to Presidential order, openly occupied the capital city and territory of Panama at the time Noriega and Del Cid were apprehended; ordinary treaty relations were thus arguably suspended.[56]

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55. "Noriega is not Panama's head of state. The Executive Branch recognizes another individual, Guillermo Endara, as Panama's President and head of state. . . . *The Endara Government is therefore the 'appropriate' entity to object* to treaty violations against the Republic of Panama, *and this it has not done.*" Government's Memorandum of Law in Response to Defendant Noriega's Motion to Dismiss Indictment, at 9-10 (emphasis added), United States v. Manuel Antonio Noriega, No. 88-0079 (S.D. Florida). "Panama has neither objected to Del Cid's seizure nor complained that its sovereignty was violated." Government's Memorandum of Law in Response to Defendant Del Cid's Request for an Evidentiary Hearing, at 8 n.4, United States v. Manuel Antonio Noriega, No. 88-0079 (S.D. Florida).

56. *See* Statement of Daniel Zafren, Specialist in American Public Law, Library of Congress, *Hearings on the Extradition Reform Act of 1981*, *supra* note 9, at 390, 391 ("a treaty may effectively be terminated or suspended . . . through the outbreak of hostilities between parties to the agreement"); *Lord McNair, The Law of Treaties* 716 (1961, reissued 1986) ("in the absence of contrary provisions, express or implied, an extradition treaty between two States which find themselves at war with another is at least suspended for the duration of the war . . . .").

In addition the President issued an order to United States troops invading Panama, directing them to apprehend Noriega as part of their military operation:

> In the course of carrying out the military operation in Panama which I have directed, I hereby direct and authorize the units and members of the Armed Forces of the United States to apprehend General Manuel Noriega and any other persons in Panama currently under indictment in the United States for drug-related offenses. I further direct that any persons apprehended pursuant to this directive are to be turned over to civil law enforcement officials of the United States as soon as practicable.

Memorandum for the Secretary of Defense from the President of the United States

This Court recognized in the 1989 Term that, where constitutional restrictions are inapplicable, the reciprocal understandings of treaty law are an appropriate means to protect citizens and aliens alike. As the Court noted in *United States v. Verdugo-Urquidez*, "If there are to be restrictions on searches and seizures which occur incident to . . . American action, they must be imposed by the political branches through diplomatic understanding, *treaty*, or legislation." 494 U.S. 259, 110 S.Ct. 1056, 1066 (1990) (emphasis added).

Here, the safeguards of the extradition treaty between Mexico and the United States were deliberately undertaken in 1980, with the advice and consent of the U.S. Senate and approval of the President, continuing a century-old treaty relationship. The Court of Appeals properly relied upon the standards of the 1980 treaty in concluding that the District Court could not exercise personal jurisdiction over a defendant abducted from Mexico by persons acting at the request of DEA agents in violation of the treaty.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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Lawyers Committee for Human Rights

March 1992

(Dec. 20, 1989), *reproduced in* Government's Memorandum in Opposition to Defendant Del Cid's Motion to Dismiss, at 3, United States v. Manuel Noriega, No. 88-0079 (S.D. Fla.).